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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 INOGEN, INC., a Delaware corporation,  
11 Plaintiff,  
12 vs.  
13 SEQUAL TECHNOLOGIES, INC., a  
14 Delaware corporation,  
Defendant.

CASE NO. 09-CV-2391-H (JMA)

**ORDER REGARDING NEW  
EVIDENCE**

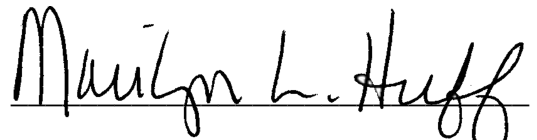
15 On October 26, 2009, Plaintiff Inogen, Inc. filed a complaint against Defendant SeQual  
16 Technologies, Inc., alleging infringement of four U.S. Patents: U.S. Patent No. 6,605,136 (“the  
17 ’136 Patent”); U.S. Patent No. 7,279,029 (“the ’029 Patent”); U.S. Patent No. 6,824,590 (“the  
18 ’590 Patent”); and U.S. Patent No. 7,473,299 (“the ’299 Patent”). (Doc. No. 1.) On February  
19 25, 2010, Defendant filed its motion for summary judgment of invalidity of the ’136, ’590,  
20 ’299, and ’029 Patents, and of non-infringement of the ’136 and ’590 Patents. (Doc. No. 19.)

21 On March 22, 2010, Plaintiff filed its response in opposition to the motion for summary  
22 judgment. (Doc. No. 28.) Plaintiff’s response argued that the lab test (Doc. No. 19-7, Ex. 22,  
23 Micro-Analysis, Inc. Rep.) offered by Defendant in support of its motion for summary  
24 judgment is inadmissible, because it has not been authenticated by the company that performed  
25 the testing. (Doc. No. 28 at 34.) On March 29, 2010, Defendant filed its reply. (Doc. No. 37.)  
26 In its reply, Defendant offers a declaration authenticating the lab test performed on the OxySiv  
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MDX.<sup>1</sup> (Doc. No. 37-3, Danaher Decl. & Ex. A.) If a movant presents new evidence in a reply to a motion for summary judgment, the court should not consider the new evidence without giving the [non-]movant an opportunity to respond. JG v. Douglas County School Dist., 552 F.3d 786, 803 n.14 (9th Cir. 2008); Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir.1996). A hearing on Defendant's motion for summary judgment is currently set for April 7, 2010, at 9:00 a.m. Accordingly, the Court orders as follows: Plaintiff may, if it wishes, respond to the new evidence offered by Defendant in its reply by April 7, 2010, at 9:00 a.m.

**IT IS SO ORDERED.**

DATED: April 5, 2010



MARILYN L. HUFF, District Judge  
UNITED STATES DISTRICT COURT

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<sup>1</sup> Defendant's reply is also supported by additional declarations from Dr. Ritter, James Bixby, and Andrew Skale.